

SENATE BILL 720

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2004 Regular Session
4r2908
CF 4r1904

By: **Senator Forehand**

Introduced and read first time: February 6, 2004

Assigned to: Judicial Proceedings

A BILL ENTITLED

1 AN ACT concerning

2 **Crimes - Internet Child Pornography - Removal**

3 FOR the purpose of requiring an investigative or law enforcement officer who receives
4 information that an item of alleged child pornography resides on a server or
5 other storage device controlled or owned by an interactive computer service
6 provider to contact the provider and request the provider's voluntary compliance
7 in removing the item within a certain period of time; requiring the officer to
8 apply for a court order if the provider does not voluntarily remove the item;
9 specifying certain information to be included in the application for a court order;
10 establishing the provider's right to a hearing on the application; requiring a
11 provider who is served with a court order that a certain item of child
12 pornography residing on its service to persons in the State shall be removed to
13 comply with the order within a certain period; specifying the content of the court
14 order; establishing a procedure for issuing and serving the court order;
15 authorizing a provider to petition the court for relief from the order on
16 certain grounds; requiring a provider who has notice that an item of child
17 pornography resides on a server or other storage device controlled or owned by
18 the provider and located in the State or pertains to a user residing in the State
19 to report the item's location to the State Police; providing a certain exception to
20 the reporting requirement; providing a criminal penalty for willful failure to
21 provide certain information to the State Police; providing a criminal penalty for
22 failure to remove a certain item of child pornography from a certain server or
23 other storage device; providing that this Act does not impose a certain duty on
24 the provider actively to monitor its server or other storage device for a certain
25 item of child pornography; providing that this Act does not apply to the
26 transmission, routing, or temporary storage of certain images or information by
27 a provider; providing venue for the prosecution of an action against a provider;
28 defining certain terms; and generally relating to interactive computer service
29 providers and child pornography.

30 BY repealing and reenacting, without amendments,
31 Article - Courts and Judicial Proceedings
32 Section 10-402(c)(2)(i) and 10-406(b)
33 Annotated Code of Maryland
34 (2002 Replacement Volume and 2003 Supplement)

1 BY repealing and reenacting, with amendments,
2 Article - Courts and Judicial Proceedings
3 Section 10-402(c)(2)(ii)1.F. and 10-406(a)(3)
4 Annotated Code of Maryland
5 (2002 Replacement Volume and 2003 Supplement)

6 BY repealing and reenacting, without amendments,
7 Article - Criminal Law
8 Section 11-207 and 11-208
9 Annotated Code of Maryland
10 (2002 Volume and 2003 Supplement)

11 BY adding to
12 Article - Criminal Law
13 Section 11-208.1
14 Annotated Code of Maryland
15 (2002 Volume and 2003 Supplement)

16 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
17 MARYLAND, That the Laws of Maryland read as follows:

18 **Article - Courts and Judicial Proceedings**

19 10-402.

20 (c) (2) (i) This paragraph applies to an interception in which:

21 1. The investigative or law enforcement officer or other
22 person is a party to the communication; or

23 2. One of the parties to the communication has given prior
24 consent to the interception.

25 (ii) It is lawful under this subtitle for an investigative or law
26 enforcement officer acting in a criminal investigation or any other person acting at
27 the prior direction and under the supervision of an investigative or law enforcement
28 officer to intercept a wire, oral, or electronic communication in order to provide
29 evidence:

30 1. Of the commission of:

31 F. Child pornography under [§ 11-207 or § 11-208] § 11-207,
32 § 11-208, OR § 11-208.1 of the Criminal Law Article;

1 10-406.

2 (a) The Attorney General, State Prosecutor, or any State's Attorney may apply
3 to a judge of competent jurisdiction, and the judge, in accordance with the provisions
4 of § 10-408 of this subtitle, may grant an order authorizing the interception of wire,
5 oral, or electronic communications by investigative or law enforcement officers when
6 the interception may provide or has provided evidence of the commission of:

7 (3) Child pornography under [§ 11-207 or § 11-208] § 11-207, § 11-208,
8 OR § 11-208.1 of the Criminal Law Article;

9 (b) No application or order shall be required if the interception is lawful under
10 the provisions of § 10-402(c) of this subtitle.

11 **Article - Criminal Law**

12 11-207.

13 (a) A person may not:

14 (1) cause, induce, solicit, or knowingly allow a minor to engage as a
15 subject in the production of obscene matter or a visual representation or performance
16 that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct;

17 (2) photograph or film a minor engaging in an obscene act,
18 sadomasochistic abuse, or sexual conduct;

19 (3) use a computer to depict or describe a minor engaging in an obscene
20 act, sadomasochistic abuse, or sexual conduct;

21 (4) knowingly promote, distribute, or possess with the intent to
22 distribute any matter, visual representation, or performance that depicts a minor
23 engaged as a subject in sadomasochistic abuse or sexual conduct; or

24 (5) use a computer to knowingly compile, enter, transmit, make, print,
25 publish, reproduce, cause, allow, buy, sell, receive, exchange, or disseminate any
26 notice, statement, advertisement, or minor's name, telephone number, place of
27 residence, physical characteristics, or other descriptive or identifying information for
28 the purpose of engaging in, facilitating, encouraging, offering, or soliciting unlawful
29 sadomasochistic abuse or sexual conduct of or with a minor.

30 (b) A person who violates this section is guilty of a felony and on conviction is
31 subject to:

32 (1) for a first violation, imprisonment not exceeding 10 years or a fine
33 not exceeding \$25,000 or both; and

34 (2) for each subsequent violation, imprisonment not exceeding 20 years
35 or a fine not exceeding \$50,000 or both.

1 (c) (1) (i) This paragraph applies only if the minor's identity is unknown
2 or the minor is outside the jurisdiction of the State.

3 (ii) In an action brought under this section, the State is not
4 required to identify or produce testimony from the minor who is depicted in the
5 obscene matter or in any visual representation or performance that depicts the minor
6 engaged as a subject in sadomasochistic abuse or sexual conduct.

7 (2) The trier of fact may determine whether an individual who is
8 depicted in an obscene matter, or any visual representation or performance as the
9 subject in sadomasochistic abuse or sexual conduct, was a minor by:

10 (i) observation of the matter depicting the individual;

11 (ii) oral testimony by a witness to the production of the matter,
12 representation, or performance;

13 (iii) expert medical testimony; or

14 (iv) any other method authorized by an applicable provision of law
15 or rule of evidence.

16 11-208.

17 (a) A person may not knowingly possess a film, videotape, photograph, or
18 other visual representation depicting an individual under the age of 16 years:

19 (1) engaged as a subject of sadomasochistic abuse;

20 (2) engaged in sexual conduct; or

21 (3) in a state of sexual excitement.

22 (b) A person who violates this section is guilty of a misdemeanor and on
23 conviction is subject to:

24 (1) for a first violation, imprisonment not exceeding 1 year or a fine not
25 exceeding \$2,500 or both; and

26 (2) for each subsequent violation, imprisonment not exceeding 2 years or
27 a fine not exceeding \$5,000 or both.

28 (c) Nothing in this section may be construed to prohibit a parent from
29 possessing visual representations of the parent's own child in the nude unless the
30 visual representations depict the child engaged:

31 (1) as a subject of sadomasochistic abuse; or

32 (2) in sexual conduct and in a state of sexual excitement.

1 11-208.1.

2 (A) (1) IN THIS SECTION THE FOLLOWING WORDS HAVE THE MEANINGS
3 INDICATED.

4 (2) "CHILD PORNOGRAPHY" MEANS ANY ELECTRONIC IMAGE OR VISUAL
5 DEPICTION THAT IS UNLAWFUL UNDER § 11-207 OR § 11-208 OF THIS SUBTITLE.

6 (3) "CONTROLLED OR OWNED", WITH RESPECT TO A SERVER OR OTHER
7 STORAGE DEVICE, MEANS TO BE ENTIRELY OWNED BY AN INTERACTIVE COMPUTER
8 SERVICE PROVIDER OR TO BE SUBJECT TO EXCLUSIVE MANAGEMENT BY AN
9 INTERACTIVE COMPUTER SERVICE PROVIDER BY AGREEMENT OR OTHERWISE.

10 (4) "INTERACTIVE COMPUTER SERVICE PROVIDER" MEANS AN ENTITY
11 THAT PROVIDES A SERVICE THAT PROVIDES OR ENABLES COMPUTER ACCESS VIA
12 THE INTERNET BY MULTIPLE USERS TO A COMPUTER SERVER OR SIMILAR DEVICE
13 USED FOR THE STORAGE OF GRAPHICS, VIDEO, OR IMAGES.

14 (B) AN INVESTIGATIVE OR LAW ENFORCEMENT OFFICER WHO RECEIVES
15 INFORMATION THAT AN ITEM OF ALLEGED CHILD PORNOGRAPHY RESIDES ON A
16 SERVER OR OTHER STORAGE DEVICE CONTROLLED OR OWNED BY AN INTERACTIVE
17 COMPUTER SERVICE PROVIDER SHALL:

18 (1) CONTACT THE INTERACTIVE COMPUTER SERVICE PROVIDER THAT
19 CONTROLS OR OWNS THE SERVER OR OTHER STORAGE DEVICE WHERE THE ITEM OF
20 ALLEGED CHILD PORNOGRAPHY IS LOCATED;

21 (2) INFORM THE INTERACTIVE COMPUTER SERVICE PROVIDER OF THE
22 PROVISIONS OF THIS SECTION; AND

23 (3) REQUEST THAT THE INTERACTIVE COMPUTER SERVICE PROVIDER
24 VOLUNTARILY COMPLY WITH THIS SECTION AND REMOVE THE ITEM OF ALLEGED
25 CHILD PORNOGRAPHY FROM ITS SERVER OR OTHER STORAGE DEVICE WITHIN 5
26 BUSINESS DAYS.

27 (C) (1) IF THE INTERACTIVE COMPUTER SERVICE PROVIDER DOES NOT
28 VOLUNTARILY REMOVE THE ITEM OF ALLEGED CHILD PORNOGRAPHY WITHIN THE
29 TIME PERIOD ESTABLISHED IN SUBSECTION (B) OF THIS SECTION, THE
30 INVESTIGATIVE OR LAW ENFORCEMENT OFFICER SHALL APPLY FOR A COURT ORDER
31 OF AUTHORIZATION TO REMOVE THE ITEM OF ALLEGED CHILD PORNOGRAPHY IN
32 ACCORDANCE WITH TITLE 10, SUBTITLE 4 OF THE COURTS ARTICLE.

33 (2) THE APPLICATION FOR A COURT ORDER SHALL:

34 (I) IDENTIFY THE ITEM OF ALLEGED CHILD PORNOGRAPHY
35 DISCOVERED ON THE SERVER OR OTHER STORAGE DEVICE CONTROLLED OR OWNED
36 BY AN INTERACTIVE COMPUTER SERVICE PROVIDER;

1 (II) PROVIDE ITS LOCATION ON THE SERVER OR OTHER STORAGE
2 DEVICE IN THE FORM OF AN INTERNET PROTOCOL (IP) ADDRESS OR UNIFORM
3 RESOURCE LOCATOR (URL);

4 (III) STATE THE GROUNDS FOR THE ISSUANCE OF THE ORDER;

5 (IV) VERIFY THAT THE ITEM OF ALLEGED CHILD PORNOGRAPHY
6 RESIDES ON THE SERVER OR OTHER STORAGE DEVICE CONTROLLED OR OWNED BY
7 THE INTERACTIVE COMPUTER SERVICE PROVIDER;

8 (V) DESCRIBE THE STEPS TAKEN TO OBTAIN VOLUNTARY
9 COMPLIANCE OF THE INTERACTIVE COMPUTER SERVICE PROVIDER WITH THIS
10 SECTION;

11 (VI) INFORM THE INTERACTIVE COMPUTER SERVICE PROVIDER OF
12 ITS RIGHT TO REQUEST A HEARING ON THE APPLICATION; AND

13 (VII) STATE THE NAME AND TITLE OF THE AFFIANT.

14 (3) THE INVESTIGATIVE OR LAW ENFORCEMENT OFFICER SHALL SERVE
15 THE APPLICATION ON THE INTERACTIVE COMPUTER SERVICE PROVIDER.

16 (4) THE INTERACTIVE COMPUTER SERVICE PROVIDER HAS THE RIGHT
17 TO REQUEST A HEARING BEFORE THE COURT IMPOSES ANY PENALTY UNDER THIS
18 SECTION.

19 (D) THE COURT SHALL REVIEW THE APPLICATION AND TESTIMONY, IF
20 OFFERED, AND, UPON A FINDING OF PROBABLE CAUSE, ISSUE AN ORDER THAT:

21 (1) AN ITEM OF CHILD PORNOGRAPHY RESIDES ON A SERVER OR OTHER
22 STORAGE DEVICE CONTROLLED OR OWNED BY THE INTERACTIVE COMPUTER
23 SERVICE PROVIDER OR IS ACCESSIBLE TO PERSONS LOCATED IN THE STATE;

24 (2) THERE IS PROBABLE CAUSE TO BELIEVE THAT THE ITEM VIOLATES §
25 11-207 OR § 11-208 OF THIS SUBTITLE;

26 (3) THE INTERACTIVE COMPUTER SERVICE PROVIDER SHALL REMOVE
27 THE ITEM RESIDING ON A SERVER OR OTHER STORAGE DEVICE CONTROLLED OR
28 OWNED BY THE INTERACTIVE COMPUTER SERVICE PROVIDER WITHIN 5 BUSINESS
29 DAYS AFTER RECEIVING THE ORDER, IF PRACTICABLE;

30 (4) FAILURE OF THE INTERACTIVE COMPUTER SERVICE PROVIDER TO
31 COMPLY WITH THE COURT'S ORDER IS A VIOLATION OF THIS SECTION;

32 (5) THE REMOVAL OF THE ITEM ON THE SERVER OR OTHER STORAGE
33 DEVICE CONTROLLED OR OWNED BY THE INTERACTIVE COMPUTER SERVICE
34 PROVIDER MAY NOT UNREASONABLY INTERFERE WITH A REQUEST BY A LAW
35 ENFORCEMENT AGENCY TO PRESERVE RECORDS OR OTHER EVIDENCE;

1 (6) THE PROCESS OF REMOVAL SHALL BE CONDUCTED IN A MANNER
2 THAT PREVENTS THE REMOVAL OF IMAGES, INFORMATION, OR DATA NOT
3 OTHERWISE SUBJECT TO REMOVAL UNDER THIS SECTION; AND

4 (7) PROVIDES THE INTERACTIVE COMPUTER SERVICE PROVIDER
5 NOTICE AND OPPORTUNITY FOR A HEARING BEFORE THE COURT IMPOSES ANY
6 PENALTY UNDER THIS SECTION.

7 (E) (1) THE OFFICE OF THE STATE'S ATTORNEY SHALL SERVE THE COURT'S
8 ORDER ON THE INTERACTIVE COMPUTER SERVICE PROVIDER.

9 (2) THE ORDER SHALL BE ACCOMPANIED BY:

10 (I) THE APPLICATION MADE UNDER SUBSECTION (C) OF THIS
11 SECTION;

12 (II) NOTIFICATION REQUIRING THE INTERACTIVE COMPUTER
13 SERVICE PROVIDER TO REMOVE THE ITEM RESIDING ON A SERVER OR OTHER
14 STORAGE DEVICE CONTROLLED OR OWNED BY THE INTERACTIVE COMPUTER
15 SERVICE PROVIDER WITHIN 5 BUSINESS DAYS AFTER RECEIVING THE ORDER;

16 (III) NOTIFICATION OF THE CRIMINAL PENALTIES FOR FAILURE TO
17 REMOVE THE ITEM OF CHILD PORNOGRAPHY;

18 (IV) NOTIFICATION OF THE RIGHT TO APPEAL THE COURT'S ORDER;
19 AND

20 (V) CONTACT INFORMATION FOR THE OFFICE OF THE STATE'S
21 ATTORNEY.

22 (F) AN INTERACTIVE COMPUTER SERVICE PROVIDER WHO IS SERVED WITH A
23 COURT ORDER UNDER SUBSECTION (E) OF THIS SECTION SHALL REMOVE THE ITEM
24 OF CHILD PORNOGRAPHY THAT IS THE SUBJECT OF THE ORDER WITHIN 5 BUSINESS
25 DAYS AFTER RECEIVING THE COURT ORDER, IF PRACTICABLE.

26 (G) (1) AN INTERACTIVE COMPUTER SERVICE PROVIDER MAY PETITION THE
27 COURT FOR RELIEF FOR CAUSE FROM AN ORDER ISSUED UNDER SUBSECTION (D) OF
28 THIS SECTION.

29 (2) THE PETITION MAY BE BASED ON CONSIDERATIONS OF:

30 (I) THE COST OR TECHNICAL FEASIBILITY OF COMPLIANCE WITH
31 THE ORDER; OR

32 (II) THE INABILITY OF THE INTERACTIVE COMPUTER SERVICE
33 PROVIDER TO COMPLY WITH THE ORDER WITHOUT ALSO REMOVING DATA, IMAGES,
34 OR INFORMATION THAT ARE NOT SUBJECT TO THIS SECTION.

35 (H) (1) (I) SUBJECT TO SUBPARAGRAPH (II) OF THIS PARAGRAPH, AN
36 INTERACTIVE COMPUTER SERVICE PROVIDER SHALL REPORT THE LOCATION OF AN

1 ITEM OF CHILD PORNOGRAPHY TO THE STATE POLICE IF THE ITEM OF CHILD
2 PORNOGRAPHY:

3 1. RESIDES ON A SERVER OR OTHER STORAGE DEVICE THAT
4 IS:

5 A. CONTROLLED OR OWNED BY THE INTERACTIVE
6 COMPUTER SERVICE PROVIDER; AND

7 B. LOCATED IN THE STATE; OR

8 2. BASED ON INFORMATION APPARENT TO THE PROVIDER
9 AT THE TIME OF THE REPORT OR DISCOVERY OF AN ITEM OF CHILD PORNOGRAPHY,
10 PERTAINS TO A SUBSCRIBER OR USER OF THE INTERACTIVE COMPUTER SERVICE
11 WHO RESIDES IN THE STATE.

12 (II) SUBPARAGRAPH (I) OF THIS PARAGRAPH DOES NOT APPLY TO
13 AN INTERACTIVE COMPUTER SERVICE PROVIDER IF:

14 1. FEDERAL LAW EXPRESSLY PROVIDES FOR OR PERMITS
15 THE REFERRAL OF A REPORT OF AN ITEM OF CHILD PORNOGRAPHY TO A STATE OR
16 LOCAL LAW ENFORCEMENT AGENCY; AND

17 2. THE INTERACTIVE COMPUTER SERVICE PROVIDER
18 COMPLIES WITH THE FEDERAL LAW.

19 (2) AN INTERACTIVE COMPUTER SERVICE PROVIDER WHO KNOWINGLY
20 AND WILLFULLY FAILS TO REPORT THE INFORMATION REQUIRED UNDER
21 PARAGRAPH (1) OF THIS SUBSECTION IS GUILTY OF A MISDEMEANOR AND ON
22 CONVICTION IS SUBJECT TO:

23 (I) FOR A FIRST VIOLATION, A FINE NOT EXCEEDING \$5,000;

24 (II) FOR A SECOND VIOLATION, A FINE NOT EXCEEDING \$20,000;
25 AND

26 (III) FOR EACH SUBSEQUENT VIOLATION, A FINE NOT EXCEEDING
27 \$30,000.

28 (I) AN INTERACTIVE COMPUTER SERVICE PROVIDER WHO WILLFULLY
29 VIOLATES SUBSECTION (F) OF THIS SECTION IS GUILTY OF A MISDEMEANOR AND ON
30 CONVICTION IS SUBJECT TO:

31 (1) FOR A FIRST VIOLATION, A FINE NOT EXCEEDING \$5,000;

32 (2) FOR A SECOND VIOLATION, A FINE NOT EXCEEDING \$20,000; AND

33 (3) FOR EACH SUBSEQUENT VIOLATION, A FINE NOT EXCEEDING
34 \$30,000.

1 (J) AN INTERACTIVE COMPUTER SERVICE PROVIDER WHO WILLFULLY
2 VIOLATES SUBSECTION (F) OR (H) OF THIS SECTION MAY BE PROSECUTED, INDICTED,
3 TRIED, AND CONVICTED IN ANY COUNTY IN OR THROUGH WHICH:

4 (1) THE INTERACTIVE COMPUTER SERVICE PROVIDER PROVIDES
5 ACCESS TO THE INTERNET;

6 (2) ANY COMMUNICATION FROM THE INTERACTIVE COMPUTER
7 SERVICE PROVIDER TRAVELED; OR

8 (3) THE COMMUNICATION FROM THE INTERACTIVE COMPUTER
9 SERVICE PROVIDER ORIGINATED OR TERMINATED.

10 (K) (1) THIS SECTION DOES NOT IMPOSE A DUTY ON AN INTERACTIVE
11 COMPUTER SERVICE PROVIDER ACTIVELY TO MONITOR ITS SERVICE OR
12 AFFIRMATIVELY TO SEEK EVIDENCE OF AN ITEM OF CHILD PORNOGRAPHY ON ITS
13 SERVICE.

14 (2) THIS SECTION DOES NOT APPLY TO THE INTERACTIVE COMPUTER
15 SERVICE PROVIDER'S TRANSMISSION OR ROUTING OF, OR INTERMEDIATE
16 TEMPORARY STORAGE OR CACHING OF, AN IMAGE, INFORMATION, OR DATA THAT
17 OTHERWISE IS SUBJECT TO THIS SECTION.

18 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
19 October 1, 2004.